

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JAIPUR BENCH, JAIPUR.

JUDGMENT

S.B.CIVIL WRIT PETITION NO.1587/1993.

KAILASH CHAND.
VERSUS
THE BOARD OF REVENUE & ORS.

Date of order. : July 21, 2006.

HON'BLE MR.JUSTICE DALIP SINGH

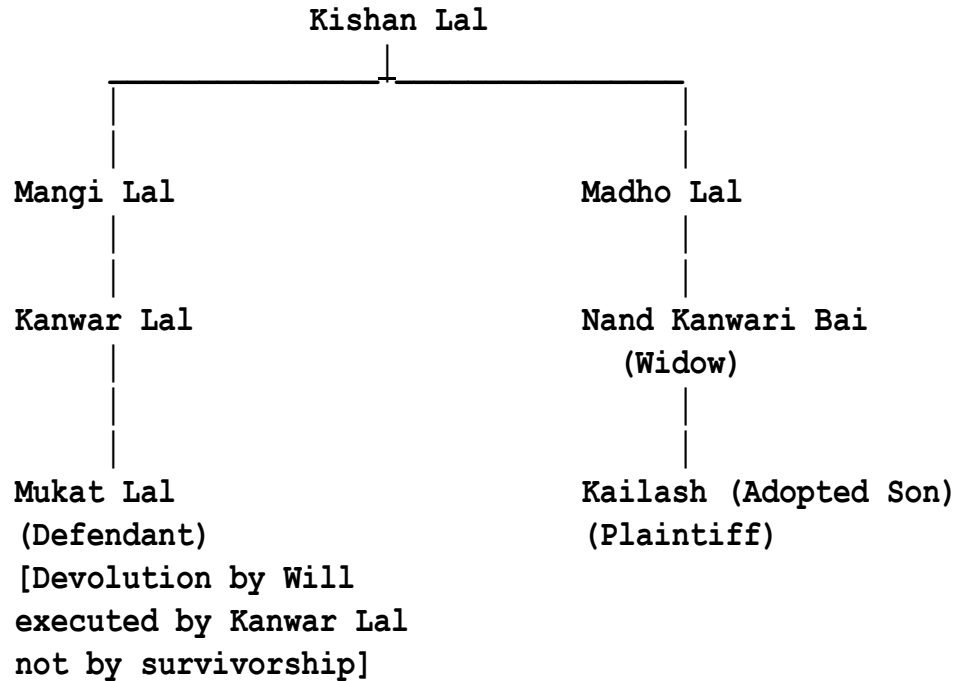
Mr.G.K.Garg]
Mr.Saransh Saini]
Ms.Sangeeta Sharma] for the petitioner.
Ms.Anita Agarwal]

Mr.K.K.Mehrishi, Sr.Adv.]
Mr.Sanjay Mehrishi] for the respondents.
Mr.Timan Singh]

BY THE COURT :

1. This writ petition has been filed by Kailash Chand who is the plaintiff and who had filed the suit for partition which was decreed by the trial court but dismissed by the learned Revenue Appellate Authority and the learned Board of Revenue.
2. The facts giving rise to the suit are that the property in dispute which is an agricultural land belonged to a common

ancestral and as per the case of the parties the following is genealogical table:-



3. A few more facts may also be taken note of. Mangi Lal son of Kishan Lal died in the year 1912 and his son Kanwar Lal remained unmarried. Kanwar Lal executed a Will in favour of Mukat Lal, the defendant on 09.02.1949. Kanwar Lal died in the year 1954. The property devolved upon Mukat Lal, the defendant under the Will of Kanwar Lal.
4. Madho Lal son of Kishan Lal died somewhere in the year 1929-1930 leaving behind his widow Smt.Nand Kanwari Bai. Smt.Nand Kanwari Bai took in adoption the petitioner in the year 1959. Smt.Nand Kanwari Bai died in the year 1972 leaving behind the plaintiff as adopted son of Madho Lal. Based on the above facts, the plaintiff claimed that he

was entitled to the share of Madho Lal in the property of Kishan Lal.

5. The defendant Mukat Lal, on the other hand, denied in the first place that the plaintiff Kailash was adopted son of Smt.Nand Kanwari Bai and Madho Lal. It was also submitted that the last coparcener Kanwar Lal died in the year 1954 leaving behind a Will in favour of Mukat Lal, the defendant and, as such, the coparcenery came to an end in the year 1954 itself and consequently, the plaintiff had no right to claim any share in the property.
6. A few additional facts may also be taken note of. Smt.Nand Kanwari Bai filed a suit in the year 1958 for declaration that the property is a joint Hindu Family Property and that the Will is illegal and that Mukat Lal was not entitled to inherit the property by virtue of the aforesaid Will. The aforesaid suit filed by Smt.Nand Kanwari Bai was dismissed by the trial court and it was held that she was entitled to maintenance alone out of the property left behind by Kishan Lal. However, the finding given on issue No.1, as is evident from the document Annexure R-4/9 at page 109 is that the property was held to be Joind Hindu Family Property but Smt.Nand Kanwari Bai was held entitled only to maintenance as in the opinion of the learned Trial Court, the Hindu Women's Right to Property Act not being applicable at the time in the State of Bundi, the share which was of her husband passed by

survivorship to Kanwar Lal, the sole surviving coparcener. It was held that Kanwar Lal inherited the property subject to the liability of Madho Lal, the husband of Smt.Nand Kanwari Bai and mother of the petitioner herein.

7. Thereafter, in the year 1966, Mukat Lal, the defendant herein, filed a suit for declaration that the judgment and decree dated 21.05.1959 in favour of Smt.Nand Kanwari Bai be declared to be void and not binding on him and that the said decree had been obtained by collusion and fraud. By the judgment and decree dated 12.07.1966, the suit filed by Mukat Lal for declaring the decree dated 21.05.1959 passed in favour of Smt.Nand Kanwari Bai to be void was dismissed. However, Mukat Lal not being satisfied preferred an appeal before the Senior Civil Judge who allowed the same by judgment dated 09.02.1968 and decreed the suit of Mukat Lal while setting aside the judgment and decree dated 21.05.1959 passed in Civil Suit No.11/1958 in favour of Smt.Nand Kanwari Bai.
8. Smt.Nand Kanwari Bai, the widow of Madho Lal being aggrieved by the aforesaid judgment and decree dated 09.02.1968 preferred a second appeal before the High Court being S.B.Civil Second Appeal No.347/1968.
9. During the pendency of the aforesaid second appeal before the High Court, Smt.Nand Kanwari Bai died in the year 1972, as such, an application came to be filed by the

present petitioner Kailash Chand stating therein that he is adopted son of Smt.Nand Kanwari Bai having been taken in adoption in the year 1959. The aforesaid application was contested by Mukat Lal, the non-petitioner/defendant herein. Consequently, the matter whether Kailash was the adopted son of Madho Lal and Smt.Nand Kanwari Bai was remitted for inquiry to the learned Munsif (trial court). After the inquiry, the learned Munsif sent his finding along with the record wherein it was recorded that Kailash Chand was the adopted son of Madho Lal. Based upon the above findings, the High Court vide order dated 06.03.1973 ordered after hearing the learned counsel for the parties recorded that "right to sue survives and, therefore, Shri Kailash Chand is entitled to be substituted as legal representative of Smt.Nand Kanwari Bai." It was recorded by the learned Single Judge that he would record the reason in the judgment itself and the case was heard on the merits on the same day and the arguments concluded. The High Court vide judgment dated 20.03.1973 (Annexure R-4/13) allowed the second appeal and set aside the judgment of the learned Civil Judge dated 09.02.1968. Consequently, the second appeal being allowed the suit filed by Mukat Lal for avoiding the judgment and decree dated 21.05.1959 in Suit No.11/1958 decided in favour of Smt.Nand Kanwari Bai, the mother of the plaintiff/petitioner stood dismissed.

10. It is in this background, as narrated in the plaint

(Annexure-1) that the plaintiff filed the present suit on the basis of the above declarations and findings that he being the adopted son of Smt.Nand Kanwari Bai, wife of Madho Lal and Madho Lal being son of Kishan Lal, the property in the hands of Kanwar Lal being a Joint Hindu Family Property, Smt.Nand Kanwari Bai as Widow of Madho Lal had a charge on the same for her right of maintenance and that on coming into force of the Hindu Succession Act in the year 1956, the limited estate of Smt.Nand Kanwari Bai ripened into an absolute estate and, therefore, the petitioner/plaintiff Kailash Chand, being the adopted son, was entitled to one half share in the same irrespective of the fact that Kanwar Lal had bequeathed the property to Mukat Lal, the defendant by his Will of 1949.

11. The learned trial court vide its judgment dated 14.12.1983 decreed the suit of the plaintiff holding under issue No.2 that the plaintiff/petitioner Kailash Chand was the adopted son and the property being a Joint Hindu Family Property in the hands of Kanwar Lal, the plaintiff Kailash Chand was entitled to one half share belonging to Madho Lal and Smt.Nand Kanwari Bai.
12. The defendant Mukat Lal being aggrieved by the aforesaid judgment and decree filed an appeal before the Revenue Appellate Authority, Kota. The learned Revenue Appellate Authority by its judgment dated 31.01.1986 reversed the judgment passed by the trial court and allowed the appeal.

The learned Revenue Appellate Authority held that as per the judgment and decree of the High Court dated 20.03.1973 passed in the second appeal, Kailash Chand had been found to be adopted son of Smt.Nand Kanwari Bai and Smt.Nand Kanwari Bai was found entitled only to maintenance and that the property having devolved in favour of Mukat Lal in the year 1954, upon the death of Kanwar Lal, by virtue of his Will executed in the year 1949, the plaintiff was not entitled to any share as his adoption took place in the year 1959 after devolution of the property on defendant by virtue of Will of Kanwar Lal, the last surviving coparcener, in the year 1954.

13. Being aggrieved by the aforesaid judgment and decree of the learned Revenue Appellate Authority, Kota reversing the judgment and decree of the learned trial court, the plaintiff Kailash Chand, the petitioner herein, preferred a second appeal before the learned Board of Revenue. The learned Board of Revenue by its judgment datd 12.03.1992 dismissed the second appeal filed by the petitioner upholding the judgment and decree dated 31.01.1986 passed by the learned Revenue Appellate Authority and dismissed the suit.
14. Being aggrieved by the aforesaid judgment of learned Board of Revenue as well as of the learned Revenue Appellate Authority, the petitioner has preferred this writ petition under Article 226 of the Constitution of India.

15. Learned counsel for the petitioner has contended that in the previous litigation itself, the High Court in its judgment dated 20.03.1973 passed in second appeal as well as in the judgment and decree dated 21.05.1959 in suit No.11/1958 had already given a finding that the property in hands of the defendant Mukat Lal derived under the Will of Kanwar Lal was Joint Hindu Family Property with Smt.Nand Kanwari Bai, the mother of the plaintiff-petitioner, having a right of maintenance. It is submitted that on the basis of the above, learned Revenue Appellate Authority as well as the learned Board of Revenue erred in holding that since the property had devolved upon Mukat Lal, the defendant in the year 1954, the coparcenery had come to an end and that the nature of the property in the year 1954 having changed as well as the fact that adoption of the plaintiff having taken place after devolution of the property upon Mukat Lal, the defendant, the plaintiff who was adopted in the year 1959 had no right in the property.
16. It is submitted that the property had been held to be a Joint Hindu Family Property under the decree dated 21.05.1959 and the judgment dated 20.03.1973 of the High Court in second appeal and Smt.Nand Kanwari Bai was held to have a right of maintenance out of the same in the hands of Mukat Lal as these decrees were against the defendant Mukat Lal, consequently by virtue of the

provisions contained in Section 14 of the Hindu Succession Act, 1956, which had come into force in the year 1956, the limited estate of Smt.Nand Kanwari Bai of her right to maintenance being widow of Madho Lal had ripened into an absolute estate and, therefore, Kanwar Lal who bequeathed the property to Mukat Lal had given the same with the rights which accrued in favour of Smt.Nand Kanwari Bai widow of Madho Lal. Consequently, the Will was valid only to the extent of one half share which was the share of Kanwar Lal and the plaintiff who was successor-in-interest being the adopted son of Madho Lal and Smt.Nand Kanwari Bai was entitled to one half share in the property irrespective of the Will.

17. Learned counsel for the respondent, on the other hand, has not only supported the judgment of the learned Revenue Appellate Authority and the learned Board of Revenue but has also sought to urge that findings on issue No.2 with regard to adoption of Kailash Chand are not correct and that the plaintiff has failed to prove the factum of adoption. It is contended that the findings which have been arrived at *inter alia* on the ground that High Court has recorded in its judgment passed in second appeal dated 20.03.1973 that the finding that the petitioner Kailash Chand, the plaintiff was the legal representative of Smt.Nand Kanwari Bai being adopted son is a finding in the inquiry conducted under Order 22 Rule 5 CPC and that the aforesaid finding cannot be held to be *res judicata* and

that the courts below were required to arrive at an independent finding irrespective of the judgment of High Court in the second appeal between the parties. Learned counsel for the respondent has further sought to urge that last coparcener Kanwar Lal having died in the year 1954 prior to the adoption of the plaintiff Kailash Chand, the property ceases to be the Joint Hindu Family Property, upon devolution in the hands of Mukat Lal who derived the same under the Will of Kanwar Lal, as such, the nature of the property not being a Joint Hindu Family Property, the plaintiff Kailash Chand was not entitled to any share in the same.

18. It has also been argued on behalf of the defendant/non-petitioner that limited estate of the right of maintenance of Smt.Nand Kanwari Bai did not ripen into an absolute estate in her favour by virtue of the provisions of Section 14 of the Hindu Succession Act, 1956 as she was not possessed of the property as required by Section 14 sub-section (1), inasmuch as, she was not in the actual possession of the property and consequently, the limited estate did not ripen into the absolute estate in her favour. Thus, the plaintiff who claims to be the adopted son does not acquire any right, title or interest in the same, even if the adoption is held proved.
19. I have perused the record, which was made available by the parties as well as considered the rival submissions. So

far as the submission of learned counsel for the respondent that adoption of the petitioner was not proved is concerned, suffice it to say that in the first place the findings arrived at by the learned trial court on issue No.2 were not challenged by the defendant before the learned Revenue Appellate Authority. Even otherwise, the learned Revenue Appellate Authority has confirmed the findings given by the learned trial court, though the appeal filed by the defendant Mukat Lal was allowed. Similarly, the learned Board of Revenue has also confirmed the finding on issue No.2 in favour of the plaintiff. Thus, this finding of fact cannot be allowed to be challenged in writ jurisdiction. Be that as it may, a perusal of the judgment dated 20.03.1973 (Annexure R-4/13) passed by the High Court in second appeal, which is a judgment inter party to which the defendant Mukat Lal was a party and having opposed the prayer of Kailash Chand made for substitution and the matter having been sent for inquiry to the learned Munsif, Bundi, the findings which were returned along with the record were to the effect that adoption of Kailash Chand in the year 1959 was held proved. The High Court in its judgment which has been filed as Annexure R-4/13 has recorded as under :-

"During the pendency of this appeal Smt.Nandkanwari died. One Kailash Chandra claiming himself to be the adopted son of Madholal applied to be substituted as appellant. Respondent Mukatlal in the first instance challenged the adoption of Kailash Chandra by Nandkanwari to her late husband Madholal. The matter

was sent for enquiry to the Munsif Bundi. After enquiry he reported that Kailash Chandra was the adopted son of Madholal and he is the only legal representative of the deceased. On behalf of the respondent it was ten urged that right to sue did not survive and, therefore, the appeal must be ordered to have abated. Since this matter required an examination of the case on merits, the decision on this question was postponed by my order dated 13.9.72 and the case was ordered to be listed for findal hearing. The case was heard on 6.3.1973. After having heard learned counsel for the parties on that date I ordered the name of Shri Kailash Chandra substituted as the legal representative of the deceased Smt.Nandkanwari."

20. Thereafter, the High Court has recorded as under :-

"In this view of the matter I am clearly of the opinion that a right to sue survives and Kailash Chandra who has been found to have been adopted by Smt.Nand Kanwari to her husband is entitled to continue the appeal to show that the decree under challenge was correctly passed. The contention of Mr.Purohit has no substance and it has to be rejected."

21. Learned counsel appearing on behalf of the respondent has sought to urge that above finding recorded in the inquiry under Order 22 Rule 5 CPC cannot be said to be *res judicata* and has relied upon the judgment of this court in the case of Rameshwar Prasad Vs. Pratap Singh and Others reported in 1989 (2) RLR 273. In para 5 of the said judgment it has been held by this court as under :-

"A finding in a proceeding under Order 22 Rule 5 CPC cannot operate as *res-judicata* as to whether the legal representative is or is not the heir of the deceased plaintiff or deceased defendant."

22. On the basis of the above, it has been contended that learned courts below have erred in deciding the issue No.2 based upon the findings of the High Court given in the second appeal. It is submitted that the aforesaid findings recorded by the High Court cannot be said to be *res judicata* as held by this court in Rameshwar Prasad's case.
23. I have given my thoughtful consideration to the above submission of the learned counsel for the respondent and also gone through the judgment rendered in Rameshwar Prasad's case. In Rameshwar Prasad's case during the pendency of the suit, one of the parties namely Takhat Singh died and an application to bring on record Bhawani Singh was filed stating that Bhawani Singh was the adopted son of Takhat Singh and his name be substituted in place of Takhat Singh. This application was opposed by the defendant Rameshwar Prasad. The trial court before whom this application was filed raised three questions one of them being whether Bhawani Singh being adopted son of Takhat Singh. The trial court proceeded to conduct the inquiry under Rule 5 of Order 22 and recorded a finding in favour of Bhawani Singh and allowed the plaintiff's application and substituted Bhawani Singh in place of the deceased defendant Takhat Singh. The said order passed by the learned trial court was challenged in revision before

the High Court and it was contended that the question as to whether Bhawani Singh is the adopted son of Takhat Singh is one of the issues in the trial and that the findings of the trial court while deciding the application for substitution based upon the inquiry conducted under Order 22 Rule 5 CPC would operate as *res judicate* between the parties and as such it should be directed that the said findings should be confined for the purposes of determination of the question of substitution leaving the parties free to lead evidence in respect of the above issue of adoption which the trial court is required to decide while deciding the suit. It was in these circumstances, this court held as under :-

"The position, therefore, boils to this that an order passed under Order 22 Rule 5 CPC should be confined for the purpose of carrying on the suit. An order under 22 Rule 5 simply decides the question whether one is legal representative or not of the deceased plaintiff or defendant. Such an order does not decide the question as to whether the legal representative has any right of heirship or any right to the property. The impugned order will, therefore, not operate as *re judicata* on the question whether Bhawani Singh was adopted by the deceased Takhat Singh. If the question of this adoption is there in the suit, it will have to be decided afresh and the impugned order will not stand as impediment or obstacle nor will it operate as *res-judicata*."

24. It would be, therefore, seen that in the case of Rameshwar Prasad, before the learned trial court which had decided in the inquiry held under Order 22 Rule 5 CPC that Bhawani

Singh was adopted son of Takhat Singh was entitled to continue with the suit being the legal representative of the deceased. There was already an issue with regard to the aforesaid question before the same court and the learned court was required to decide the same while deciding the suit. It is in these circumstances, that this court laid down that in a suit where the question of adoption has been raised, it will have to be decided by the court while deciding the suit and that the order under Rule 5 of Rule 22 CPC would not operate as an impediment or as *res-judicata*. In the case at hand, on the death of Smt.Nand Kanwari Bai, an application for substitution was filed by Kailash Chand before the High Court in second appeal alleging himself to be the adopted son of Smt.Nand Kanwari Bai. This fact was disputed by the appellant who is the non-petitioner herein Mukat Lal. The matter was referred to the learned Munsif for inquiry and the findings were returned by the Munsif to the High Court and the High Court, as has been mentioned above, came to the conclusion that not only did the right to sue survives upon the Kailash Chand, the petitioner herein, but he was also "found" to be the adopted son of Smt.Nand Kanwari Bai. Thus, the High Court gave a finding independently, though based upon the report and the evidence recorded by the learned Munsif and after considering the objections and contentions raised by the appellant Mukat Lal that Kailash Chand, the petitioner herein, was the adopted son of Smt.Nand Kanwari Bai.

25. A perusal of the judgment of High Court in second appeal further shows that it was also contended that the right to maintenance was personal to Smt.Nand Kanwari Bai and the right to sue did not survive to Kailash Chand. It was held that in the instant case, the maxim of *actio personalis moritur cum persons*, that right of action dies with the person did not apply and the petitioner who had been substituted was held entitled to continue to represent the estate of the deceased Smt.Nand Kanwari Bai. Thus, in the facts and circumstances of the present case, I am of the view that the judgment of Rameshwar Prasad (supra) does not apply as the objection with regard to the question whether the plaintiff Kailash Chand is the adopted son of Smt.Nand Kanwari Bai and Madho Lal already stands decided between the parties (Mukat Lal, defendant and Kailash Chand, plaintiff) by virtue of the judgment in the second appeal dated 20.03.1973. The principle of *res judicata*, as has been held by their Lordships of the Hon'ble Supreme Court in the case of Satyadhan Ghosal Vs. Smt.Deorajin Debi reported in AIR 1960 SC 941 and I.L.Janakirama Iyer Vs. P.M.Nilkanta Iyer reported in 1962 SC 633 is that for the purposes of achieving finality in litigation, the courts have applied the principles of *res judicata* so that the original as well as the higher Court must in any subsequent future litigation proceed on the basis that the decision which was given previously was correct. Consequently, I find no force in the submission of the

learned counsel for the respondent, in the facts and circumstances of the case, that the judgment of the High Court dated 20.03.1973 relied upon by the learned courts below while deciding the issue No.2 could not have been relied upon to determine the question of adoption.

26. In view of the above, I am of the view that issue No.2 holding that the petitioner was the adopted son of Smt.Nand Kanwari Bai and Madho Lal has been rightly determined by the learned courts below and calls for no interference.
27. The next submission which requires consideration is whether Smt.Nand Kanwari Bai acquired an absolute estate on coming into force the provisions of Hindu Succession Act, 1956 by virtue of Section 14 of the Act? So far as the above question is concerned, the judgment dated 21.05.1959 (Annexure R-4/9) passed in Suit No.11/1958 Smt.Nand Kanwari Bai Vs. Mukat Lal may be seen. In the aforesaid judgment it was held that "the suit property was a Joint Hindu Family Property." It has been held therein as under :-

"The husband of the plaintiff admittedly died about 20 or 22 years ago when there was no Hindu Women's Right to Property Act in force in the Bundi State. The share of her husband, therefore passed, by survivorship to the other co-parcener Kanwar Lal who was then alive. But it passed on to Kanwar Lal subject to the liabilities of Madholal. Madholal was bound to maintain his wife, the plaintiff in this

case. Kanwarlal, therefore, on the death of Madholal became liable to maintain the plaintiff out of the share of Madholal and to that extent only." (emphasis supplied)

It was, therefore, decreed that the deceased Smt.Nand Kanwari Bai was entitled to maintenance out of the aforesaid property left behind by Madho Lal in the hands of Kanwar Lal which he bequeathed to the defendant Mukat Lal.

28. In the judgment dated 20.03.1973, given by the High Court while deciding the second appeal it has also been recorded by this court in its judgment as under :-

"The first appellate court also failed to focus its attention to the finding of the Civil Judge in suit No.11/58 wherein he held that the suit property was joint Hindu family property. This finding remained unchallenged..... It has not been disputed that the disputed property involved in the present litigation is the same as was in the earlier suit No.11/58. Once it was found that property was joint Hindu family property, the inference is inescapable that Smt.Nand Kanwari who was the widow of one of the deceased coparceners, had the right of maintenance in the suit property. The statement of Ramnath does not also advance the case of Mukatlal as Smt.Nand Kanwari was bound to be maintained by him inasmuch as he received the joint family property after the death of Madholal who also had a share in the property." (emphasis supplied)

29. Thus, so far as the nature of property which devolved upon Mukat Lal is concerned, there is no doubt that the two

judgments, referred to above, had clearly decided that the property in the hands of Kanwar Lal, after the death of Madho Lal, husband of Smt.Nand Kanwari Bai was a joint Hindu family property and further, as indicated above from the judgments of this court, the property in the hands of Mukat Lal was also held to be a joint Hindu family property as the property was the same which was the subject matter of the earlier suit No.11/1958.

30. In view of the above, it can safely be held that property which came in the hands of Kanwar Lal, came with the right of Smt.Nand Kanwari Bai to receive maintenance out of the share left behind by her deceased husband Madho Lal. Consequently, when the property was bequeathed by Kanwar Lal to Mukat Lal, the defendant herein, it devolved upon Mukat Lal, subject to the aforesaid right of Smt.Nand Kanwari Bai who was entitled to maintenance out of the same as held by the High Court in the earlier litigations. The question, therefore, arises whether the right of maintenance which was a limited estate ripened into an absolute right in favour of Smt.Nand Kanwari Bai with the coming into force of Hindu Succession Act, 1956. The provisions of Section 14 of the Hindu Succession Act, 1956 reads as under :-

"14.Property of a female Hindu to be her absolute property.- (1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as

full owner thereof and not as a limited owner.

Explanation.- In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her at *stridhan* immediately before the commencement of this Act.

(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property."

31. The aforesaid provisions have been the subject matter of consideration before the High Courts as well as the Hon'ble Supreme Court and the question which has been raised by the learned counsel for the respondent that Smt.Nand Kanwari Bai not being "in possession" of the property as required by Section 14, her limited estate did not ripened into an absolute estate may be examined.
32. The Hon'ble Supreme Court in the case of V.Tulasamma and Others Vs.Sesha Reddy (dead) by L.Rs. Reported in (1997) 3 SCC 99 has examined the right of the widow in perspective of the law prior to the coming of the Act as well as after coming into force the Act of 1956. In para 20 of the said judgment, while dealing with the Shastric Hindu Law, the

propositions have been enumerated and the first proposition is as under :-

"(1) that a Hindu woman's right to maintenance is a personal obligation so far as the husband is concerned, and it is his duty to maintain her even if he has no property. If the husband has property then the right of the widow to maintenance becomes an equitable charge on his property and any person who succeeds to the property carries with it the legal obligation to maintain the widow."

33. The proposition No.4 reads as follows :-

"(4) that the right to maintenance is undoubtedly a pre-existing right which existed in the Hindu Law long before the passing of the Act of 1937 or the Act of 1946, and is, therefore, a pre-existing right."

34. The Hon'ble Supreme Court after going through the earlier judgments of the High Court and the Supreme Court came to the conclusions which have been summarized in para 62 of the report. The proposition No.6 as laid down reads as under :-

"(6) The words "possessed by" used by the Legislature in Section 14(1) are of the widest possible amplitude and include the state of owning a property even though the owner is not in actual or physical possession of the same. Thus, where a widow gets a share in the property under a preliminary decree before or at the time when the 1956 Act had been passed but had not been given actual possession under a final decree, the property would be deemed to be

possessed by her and by force of Section 14(1) she would get absolute interest in the property. It is equally well settled that the possession of the widow, however, must be under some vestige of a claim, right or title, because the section does not contemplate the possession of any rank trespasser without any right or title."

35. In para 68 of the report in the judgment per Hon'ble P.N.Bhagwati, J. while concurring with the judgment of Hon'ble Fazal Ali, J. has held that the word "possessed" occurring in the Section 14 has to be interpreted by giving a most expansive interpretation with a view to advance the social purpose of the legislation and it was held that possession need not be actual or physical possession or personal occupation of the property by the Hindu female, but may be possession in law. It was held by their Lordships that Section 14(1) of the Act has to be seen in a large amplitude and it covers every kind of acquisition of property by a female Hindu including acquisition in lieu of maintenance.
36. The aforesaid judgment in Tulasamma's case (supra) has been subsequently referred with approval by the Hon'ble Supreme Court in a series of cases.
37. In the case of Dr.Mahesh Chand Sharma Vs. Smt.Raj Kumari Sharma and others reported in AIR 1996 SC 869, it has been held that-

"... the expression "possessed" in Section 14 (1) means and refers to a right to possession and not necessarily actual or physical possession. So long as she has a right to possession, the mere fact that the female Hindu was not in physical possession matters very little. Therefore, it is immaterial whether Satyawati was physically occupying the said first floor or not. So long as she had the right to possession over the said first floor, Section 14(1) is attracted." (emphasis supplied)

38. Similarly, in the case of V.Muthusami (dead) by L.Rs. Vs. Angammal and Others reported in (2202) 3 SCC 316 it has been held by their Lordships on the basis of the judgment in V.Tulasamma's case (supra) in para 16 as under :-

"... Angammal is claiming maintenance as of right against the property i.e. *Jus ad rem* left behind by her husband as property includes both movable and immovable properties. The right of maintenance could be enforced by Angammal against the estate of her husband in the hands of Alagirisami, though Angammal was not in actual physical possession of the land, she was in legal possession as she never parted with the right of her maintenance and she could enforce such right in law....." (emphasis supplied)

39. In para 17 of the said report, their Lordships have further clarified and held as under :-

".... There is a dispute regarding actual physical possession of the suit land by Angammal but it is immaterial as she had legal possession, which would be sufficient in view of the law laid down in *Tulasamma case*.

40. Thus, in the light of the above judgments of the Hon'ble Supreme Court, the submission of the learned counsel for the respondent that Section 14 of the Hindu Succession Act, 1956 has no application in view of the fact that Smt.Nand Kanwari Bai wife of Madho Lal was not in actual physical possession of the property cannot be accepted. In view of the pronouncements of the Hon'ble Supreme Court which have been referred to above, it is clear that the right of the widow to maintenance creates a charge on the property in the hands of other coparceners or in the hands of the others who succeed to the said property and that her right is not defeated on account of any transfer or devolution in the hands of the person who succeeds to the said property. Further on account of her aforesaid legal right, she remains entitled to the legal possession and enjoyment of the property and based on the said right, her limited estate ripens into an absolute estate by virtue of Section 14 of the Hindu Succession Act, 1956.
41. In the instant case, it had already been decreed in favour of Smt.Nand Kanwari Bai that property was joint Hindu Family Property in the hands of Mukat Lal, the defendant and that Smt.Nand Kanwari Bai, the mother of the plaintiff/petitioner had right to maintenance in the same. The property though being possessed by Mukat Lal, Mukat Lal carried with it the liability of the defendant since Kanwar Lal had to maintain Smt.Nand Kanwar Bai out of the property left behind by her deceased husband Madho Lal,

brother of Kanwar Lal. The aforesaid right on coming into force of the Hindu Succession Act, 1956 ripened into an absolute estate and Smt.Nand Kanwari Bai, therefore, became entitle to the share of Madho Lal in the property left behind in the hands of the defendant Mukat Lal which came to be devolved upon him by virtue of the Will of Kanwar Lal. Thus, the judgments of the learned Revenue Appellate Authority and the learned Board of Revenue holding that the property in the hands of the defendant Mukat Lal was no longer a Joint Hindu Family property is liable to be set aside.

42. In view of the fact that it has been held that the plaintiff Kailash Chand was adopted by Smt.Nand Kanwari Bai, he consequently became the adopted son of Madho Lal and Smt.Nand Kanwari Bai and, therefore, acquired an interest in the property left behind by Madho Lal to the extent of one half and other half being in the share of Mangi Lal and his son Kanwar Lal. It has been held by their Lordships of the Hon'ble Supreme Court in the case of Vasant and Another Vs. Dattu and Others reported in AIR 1987 SC 398 that while dealing with the case of adoption made by the widow of a person who died prior to the coming into force of the Hindu Succession Act, 1956 in respect of the provisions contained in the Section 12 of the Hindu Adoptions and Maintenance Act, 1956 as follows :-

"4. We are concerned with proviso (c) to S.12. The introduction of a member into a joint family, by

birth or adoption, may have the effect of decreasing the share of the rest of the members of the joint family, but it certainly does not involve any question of divesting any person of any estate vested in him. The joint family continues to hold the estate, but, with more members than before. There is no fresh vesting or divesting of the estate in anyone.

5. The learned counsel for the appellants urged that on the death of a member of a joint family the property must be considered to have vested in the remaining members by survivorship. It is not possible to agree with this argument. The property, no doubt passes by survivorship, but there is no question of any vesting or divesting in the sense contemplated by S.12 of the Act. To interpret S.12 to include cases of devolution by survivorship on the death of a member of the joint family would be to deny any practical effect to the adoption made by the widow of a member of the joint family. We do not think that such a result was in the contemplation of Parliament at all."

43. In the light of the above findings arrived at by the learned Revenue Appellate Authority and the learned Board of Revenue to the effect that since Madho Lal had died prior to the coming into force of the Act of 1956, the property became vested in the sole coparcener Kanwar Lal and since the adoption has taken place in the year 1959 after coming into force of the Act of 1956, Kailash Chand, the petitioner would not be entitled to any share in the property as he was adopted by the widow of Madho Lal, after coming into force of the Act of 1956 cannot be sustained in law. As has been held by their Lordships of the Hon'ble Supreme Court in the above said case of Vasant

and Another Vs. Dattu and Others, that no question of any vesting or divesting as contemplated by the Section 12 of the Hindu Adoptions and Maintenance Act, 1956 can be said to have taken place and, therefore, the right of Kailash Chand, the plaintiff/petitioner herein which was denied by the learned Revenue Appellate Authority and the learned Board of Revenue in the light of the above judgment is erroneous. The said finding by the learned Revenue Appellate Authority and the learned Board of Revenue are, therefore, liable to be quashed and are set aside.

44. On the basis of what has been held above, it is clear that the judgments passed by the learned Revenue Appellate Authority and the learned Board of Revenue are set aside. The judgment and decree passed by the learned trial court is upheld.

45. This writ petition is accordingly allowed, as indicated above.

(DALIP SINGH) ,J.

Solanki DS, Jr.P.A.